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No. 80-231

In the Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
APPELLANTS

v.

STATE OF INDIANA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

The principal regulatory and enforcement provisions of the Surface Mining Control and Reclamation Act of

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* Other defendants below and appellants in this Court are the Director of the Office of Surface Mining Reclamation and Enforcement, the Office of Surface Mining Reclamation and Enforcement, the United States Department of the Interior, and the United States of America.

** Other plaintiffs below and appellees here are the Governor of Indiana, the Director of the Indiana Department of Natural Resources, the Indiana Department of Natural Resources, the Indiana Coal Association, Meadowlark Farms, Inc., AMAX Coal Company, Peabody Coal Company, and John A. Conlon.

1977, 30 U.S.C. (Supp. I) 1201 *et seq.*, are contained in Title V of the statute, 30 U.S.C. (Supp. I) 1251-1279. Among the more important provisions in Title V are those dealing with surface mining on prime farmland, the handling and replacement of topsoil during and after surface mining operations, the restoration of mined lands to their approximate original contour, the designation of certain lands as unsuitable for surface mining, and the pre-mining administrative review of proposed post-mining land uses. The questions presented in this case are:

1. Whether the aforementioned provisions in Title V of the Surface Mining Act exceed Congress' power under the Commerce Clause of Article I, Section 8, of the Constitution.

2. Whether the same provisions violate the Tenth Amendment.

3. Whether the "prime farmland" and approximate original contour provisions in Title V of the Surface Mining Act violate the Due Process Clause of the Fifth Amendment because they are arbitrary and capricious or impermissibly discriminate among coal mine operators in different states.

4. Whether the provisions in Title V concerning the reclamation of prime farmlands after surface mining and the designation of certain lands as unsuitable for surface mining take private property without just compensation, in violation of the Fifth Amendment.

5. Whether Section 518(c) of the Act, which requires a coal mine operator to deposit the proposed amount of a civil penalty into an interest-bearing escrow account before seeking full administrative review, violates the Due Process Clause of the Fifth Amendment.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-44a) is not yet reported.

JURISDICTION

The final order and judgment of the district court (J.S. App. 45a-49a) was entered on June 10, 1980. The Secretary of the Interior filed a notice of appeal to this Court on June 16, 1980 (J.S. App. 50a-51a). The Court noted probable jurisdiction on October 6, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution, the Fifth and Tenth Amendments to the Constitution, and the relevant portions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.*, are reprinted in J.S. App. 55a-68a.

STATEMENT

1. Like *Virginia Surface Mining and Reclamation Ass'n* v. *Andrus*, 483 F. Supp. 425 (W.D. Va. 1980), probable jurisdiction noted, Nos. 79-1538 and 79-1596 (Oct. 6, 1980), this case involves a broad constitutional challenge to numerous important provisions of the Surface Mining Act. Because of geographical differences between Virginia and Indiana and the resulting differences in the methods and effects of surface coal mining operations in the two states, many of the specific provisions attacked in the present case are different from the "steep slope" provisions that were the primary focus of plaintiffs' complaint in *Virginia Surface Mining*. Plaintiffs' legal theories in the two cases are virtually identical, however.

The basic structure of the Surface Mining Act is described in the Secretary's brief in the Virginia case at pages 2-7.[1] The specific provisions of the Act challenged by the State of Indiana and the other plaintiffs below are listed in the district court's opinion (J.S. App. 3a-5a). A brief description of these provisions follows.

First, plaintiffs attack several sections of the Act referred to collectively as the "prime farmland" provisions. These sections establish certain special requirements for surface coal mining operations conducted on land that qualifies as prime farmland under a definition promulgated by the Secretary of Agriculture and that has historically been used as cropland within the meaning of the Secretary of the Interior's regulations. See Section 701(20) of the Act, 30 U.S.C. (Supp. I) 1291(20).[2] In particular, Section 510(d)(1) of the Act provides that an application for a surface mining permit on prime

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[1] A copy of the Secretary's brief in *Virginia Surface Mining* has been sent to plaintiffs in the present case.

[2] Section 701(20) provides:

> [T]he term "prime farmland" shall have the same meaning as that previously prescribed by the Secretary of Agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface layer composition, susceptibility to flooding, and erosion characteristics, and which historically have been used for intensive agricultural purposes, and as published in the Federal Register.

The Secretary of Agriculture's definition is found at 7 C.F.R. Part 657, and is incorporated into the Secretary of the Interior's permanent regulations implementing the Surface Mining Act by 30 C.F.R. 701.5, 44 Fed. Reg. 15320 (1979). See also *id.* at 15318-15319 (defining "cropland"), and 30 C.F.R. 716.7, 42 Fed. Reg. 62693-62694 (1977), the interim regulation defining "prime farmland" for purposes of the Act's initial phase. The United States District Court for the District of Columbia remanded the latter regulation to the Secretary for reconsideration on grounds not directly relevant here. See *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1312 (1978), aff'd in part and rev'd in part on other grounds, 627 F.2d 1346 (D.C. Cir. 1980). The Secretary has promulgated a proposed new regulation defining "prime farmland" for purposes of the interim program. See 44 Fed. Reg. 33625 (1979).

farmland may be granted only if the mine operator can demonstrate its "technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as nonmined prime farmland in the surrounding area under equivalent levels of management * * *." The operator also must show that it can "meet the soil reconstruction standards" for prime farmland set forth in Section 515(b)(7). 30 U.S.C. (Supp. I) 1260(d)(1), 1265(b)(7). Section 515(b)(7) generally requires that, if surface coal mining operations are to be conducted on prime farmlands, the distinct soil horizons must be separately removed, segregated, stockpiled, and then properly replaced and regraded. Furthermore, Section 519(c)(2) provides that, upon the completion of mining activities on prime farmland, a mine operator's performance bond will be released only on a showing that soil productivity "has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices * * *." 30 U.S.C. (Supp. I) 1269(c)(2).

In addition to the prime farmland provisions, plaintiffs challenge a variety of more general sections in the Act applicable uniformly throughout the country. These include Section 515(b)(3)'s requirement that mined land be restored to its approximate original contour and the command in Section 515(b)(5) that surface mine operators remove topsoil separately during mining activities and preserve it for use during reclamation if it is not to be replaced immediately on the backfill area of the mining cut. 30 U.S.C. (Supp. I) 1265(b)(3), (5).[3] Plaintiffs object generally to the provisions in Section 508 of the Act that require applicants for surface mining permits to include in their application proposed

[3] Section 515(b)(3) states the approximate original contour requirement applicable generally to surface mining operations; plaintiffs in *Virginia Surface Mining* challenged the approximate original contour provision in Section 515(d) of the Act, which is applicable only to surface mining operations on steep slopes.

reclamation plans specifying the intended post-mining use for the land involved and the method by which that use will be achieved. 30 U.S.C. (Supp. I) 1258. Plaintiffs also complain about Section 522 of the statute, which provides that states wishing to assume primary regulatory authority over surface mining operations within their borders during the permanent program phase must establish and implement a planning and administrative review procedure for determining whether particular lands are unsuitable for some or all kinds of surface mining. 30 U.S.C. (Supp. I) 1272(a), (c), (d).[4]

Like the plaintiffs in *Virginia Surface Mining*, plaintiffs here also object to Section 522(e)'s general injunction against mining within 100 feet of roadways and cemeteries or within 300 feet of public buildings, schools, churches, public parks, or occupied dwellings. 30 U.S.C. (Supp. I) 1272(e)(4) and (5). Finally, like the plaintiffs in *Virginia Surface Mining*, plaintiffs in the present case raise a due process challenge to the procedure for collecting proposed civil penalties under Section 518(c) of the Act. 30 U.S.C. (Supp. I) 1268(c).

2. The present case comprises two companion suits, consolidated for all purposes. Both were filed in August 1978, the first by the State of Indiana and several of its officials, and the second by the Indiana Coal Association, coal mine operators, and others. Plaintiffs contended: (1) that all the substantive statutory provisions described above (*i.e.*, all the provisions mentioned with the exception of Section 518(c)) are beyond the scope of the congressional power to regulate interstate commerce under Article I, Section 8, of the Constitution; (2) that the same provisions violate the Tenth Amendment because they regulate land uses, thereby usurping an "in-

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[4] Note 9 of the Secretary's brief in *Virginia Surface Mining* describes generally the progress to date of the states' submission of proposed permanent regulatory programs under Section 503 of the Act and the Secretary's response to those submissions. Like that submitted by Virginia, the proposed program submitted by Indiana was approved in part and disapproved in part. See 45 Fed. Reg. 78482 (Nov. 25, 1980).

tegral governmental function" traditionally reserved to and performed by the states; (3) that the provisions of the Act dealing with reclamation of prime farmlands and restoration of mined lands to their "approximate original contour" violate the substantive due process and equal protection guarantees of the Fifth Amendment because they impermissibly discriminate among mine operators in different states; (4) that the prime farmland provisions of the Act and Section 522's provisions regarding the designation of certain lands as unsuitable for surface mining take private property without just compensation, in violation of the Fifth Amendment; and (5) that Section 518(c)'s requirement that proposed civil penalties be deposited into escrow as a condition of full administrative review violates due process.

On April 18, 1979, a hearing was held on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss. At this one-day hearing, the parties presented several exhibits and affidavits in support of their positions, and eight witnesses testified. Pursuant to a stipulation (A. 48-50), the district court ultimately decided the case on the merits without taking further evidence. On June 10, 1980, the court issued an order (J.S. App. 45a-49a) and opinion (J.S. App. 1a-44a) sustaining each of plaintiffs' constitutional challenges to the Act as described above.[5]

The court adopted plaintiffs' argument that various sections of Title V of the Act exceed Congress' power under the Commerce Clause (J.S. App. 12a-19a), and held that, in any event, the same provisions of the Act violate the reserved rights of the states under the Tenth Amendment (*id.* at 36a). In particular, the court ruled that the portions of the Act dealing with prime farmlands, restoration of mined lands to their "approximate original contour," topsoil replacement, restriction of surface mining in certain locations, and pre-mining review

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[5] The court's opinion consists of "Findings of Fact and Conclusions of Law" adopted *verbatim* from the proposal submitted by plaintiffs.

of post-mining land uses are unconstitutional (*id.* at 46a-48a). The district court also concluded, on equal protection and substantive due process grounds, that the approximate original contour and prime farmland provisions of the Act violate the Due Process Clause of the Fifth Amendment (*id.* at 37a-39a). In addition, the court held that the statutory requirement that mined prime farmland be restored to equivalent levels of productivity offends the Just Compensation Clause of the Fifth Amendment (*id.* at 40a-42a). The court found another unconstitutional taking in Section 522 of the Act, which, with various exceptions, prohibits surface coal mining within 100 feet of any cemetery or the "outside right-of-way line of any public road," or within 300 feet of any public building, school, church, public park, or occupied dwelling, and establishes procedures for designating lands unsuitable for all or certain types of surface coal mining (*ibid.*). Finally, the court ruled that the civil penalty provisions in Section 518(c) of the Act deny mine operators due process and are therefore invalid (*id.* at 43a-44a). The district court's judgment permanently enjoined enforcement of all the foregoing provisions (J.S. App. 45a-49a).

The Secretary filed a notice of appeal to this Court on June 16, 1980 (J.S. App. 50a-51a). On June 25, 1980, the district court denied the Secretary's motion for a stay pending appeal (J.S. App. 52a-53a). On July 2, 1980, Justice Stevens stayed the district court's order pending final disposition of this appeal (J.S. App. 54a). The Court noted probable jurisdiction on October 6, 1980.

SUMMARY OF ARGUMENT

I

The numerous provisions of the Surface Mining Act challenged by plaintiffs do not exceed Congress' power under the Commerce Clause. Although different portions of the Act are disputed in this case, the Secretary's Commerce Clause arguments are essentially the same as

those already advanced in *Virginia Surface Mining* (Br. 20-27).

The district court erred in invalidating the "prime farmland" provisions on the basis of a judicial finding that surface mining operations on prime farmlands "have an infinitesimal or trivial impact on interstate commerce." Not only did this finding accord inadequate deference to the contrary views of Congress, but it also ignored the decisions of this Court establishing that the amount of commerce affected by a particular activity does not determine whether Congress legitimately may regulate that activity under the Commerce Clause.

The district court further erred in concluding that a wide variety of statutory provisions generally applicable to all surface mining operations under the Act are not rationally related to the congressional goal of removing or minimizing the adverse effects of surface mining on interstate commerce. The court arbitrarily confined the legislative purpose of the Act to "the alleviation of water or air pollution" and thus disregarded several other important objectives that Congress hoped to achieve in the statute. In particular, the court failed to consider adequately the congressional desire to preserve the productivity of land subject to surface mining and to protect life and property in nearby communities from the hazards created by surface mining operations. When the full range of legislative goals is considered, the relationship of the challenged statutory provisions to the protection of interstate commerce becomes clear. Moreover, even if the alleviation of water pollution is the only objective considered, the district court was not justified in concluding that statutory provisions such as the topsoil replacement requirement in Section 515(b)(5) of the Act are unrelated to that goal.

II

The statutory provisions challenged by plaintiffs also do not violate the rights reserved to the states under the

Tenth Amendment. The Secretary's primary contentions in this regard are stated in the *Virginia Surface Mining* brief (Br. 28-38), and we rely on them here. The district court erred both by assuming that control of land use is a matter exclusively within the province of state and local governments and by determining that the Surface Mining Act is and was intended to be primarily a land-use measure. This Court's decisions establish that federal legislation authorized by the Commerce Clause does not offend the Tenth Amendment merely because it may affect the use of land in particular states. See, *e.g.*, *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508 (1941); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). Moreover, the Surface Mining Act does not and was not intended to control the use of land on a long-term basis. In most cases, the Act seeks only to restore surface-mined land to the condition it was in before mining began. Once that is accomplished, the Act imposes no restrictions whatever on the way in which land may be used.

III

The "prime farmland" provisions and the approximate original contour requirement in Section 515(b)(3) of the Act do not violate the substantive due process and equal protection guarantees of the Fifth Amendment. The mere fact that these provisions may have differing impacts in different parts of the country does not show that Congress acted irrationally or that it impermissibly distinguished between one region and another. As the district court observed in *Virginia Surface Mining* (79-1538 J.S. App. 41a), "almost any form of economic regulation will affect some persons or interests more harshly than others." Legislation "adjusting the benefits and burdens of economic life" comes to this Court with a strong presumption of constitutionality, and persons seeking to overturn such statutes bear a heavy burden of showing that Congress acted improperly. Plaintiffs have not carried that burden in this case. Various provisions of the Act may affect certain areas more than

they affect other areas, but that is because geographical conditions are not constant throughout the country. Congress, understandably, has determined that regulatory measures appropriate for steep-slope mines are not necessarily suitable for "prime farmland" mines.

IV

Section 522 of the Act and the "prime farmland" provisions requiring restoration of mined farmlands to the productivity levels of unmined land in the same area under equivalent levels of management do not take private property without just compensation, in violation of the Fifth Amendment. The majority of the Secretary's arguments concerning the taking question are fully explicated in the *Virginia Surface Mining* brief (Br. 39-60), and, once again, we rely on the discussion there.

The district court's invalidation of the "prime farmland" provisions appears to have been based in large part on a misconstruction of the statute. The court distinguished between "high levels of management" and "basic levels of management" and concluded that mined prime farmland could be restored to productivity attained under "basic" management practices but not to that achieved under "high" management practices. These terms are not defined or even used in the relevant statutory provisions, which require only that productivity comparisons between restored prime farmland and unmined land in the surrounding area be conducted on the basis of "equivalent" levels of management. The court essentially defined "high levels of management" to be those levels that would result in productivity beyond that which can be achieved after surface mining; it then held that the restoration requirements of the Act are "technologically impossible" to satisfy in areas where "high levels of management" have been employed. The "prime farmland" provisions were not intended to be interpreted in this artificial way, and the Secretary has not applied them in the manner suggested by the district

court. Duly enacted statutes should not be stricken on the basis of semantic manipulations that distort the regulatory purpose of Congress.

Nor do Sections 522(a), (c), and (d) of the Act take property without compensation. These provisions merely establish procedures for designating certain lands as unsuitable for some or all types of surface mining during the permanent program phase. No such designations have yet been made under the Act, and plaintiffs therefore have not been affected by the statute in any way. If plaintiffs wish to object, they should complain about individual designations when made, not about the statute that provides for the designation process. Section 522 contains several features designed to ameliorate harshness in particular circumstances, and it is impossible to evaluate the effects of the statute until it is applied in a concrete situation.

V

For the reasons stated at some length in the Secretary's *Virginia Surface Mining* brief (Br. 67-71), the civil penalty provisions in Section 518(c) of the Act do not violate the Due Process Clause of the Fifth Amendment.

ARGUMENT

I

THE CHALLENGED PROVISIONS OF TITLE V OF THE SURFACE MINING ACT DO NOT EXCEED CONGRESS' POWER UNDER THE COMMERCE CLAUSE

The district court ruled (J.S. App. 8a-19a) that approximately 21 different provisions in Title V of the Surface Mining Act are unconstitutional because they exceed Congress' power under the Commerce Clause in Article I, Section 8, of the Constitution. The court's decision in this regard was divided into two principal parts. The court held first that the six "prime farm-

land" provisions [6] are "directed at facets of surface coal mining which have no substantial and adverse effect on interstate commerce" (J.S. App. 17a). For this reason, the court said, the "prime farmland" provisions are not "reasonably and plainly adapted to the legitimate end of removing any substantial adverse effect on interstate commerce" (*ibid.*). With respect to the remaining substantive provisions under attack, which apply to surface mining operations generally, the court did not suggest that the impact of surface mining on interstate commerce is insufficiently significant to justify congressional regulation. Rather, the court assumed that surface mining's only significant effects on commerce involve water pollution or air pollution, determined that such adverse environmental effects are adequately treated elsewhere in the Act, and, on that basis, concluded that all 15 of the generally applicable provisions challenged by plaintiffs are "not means reasonably and plainly adapted to the legitimate end of removing substantial adverse effects on interstate commerce" (*id.* at 19a).

A. As the Secretary has argued in *Virginia Surface Mining* (Br. 23), it is well-established that the Commerce Clause grants Congress plenary power not only to regulate the use and protect the instrumentalities of interstate commerce, but also to regulate activities affecting such commerce. *Perez* v. *United States*, 402 U.S. 146, 150-152 (1971); *Wickard* v. *Filburn*, 317 U.S. 111, 124-125 (1942). The statutory findings concerning the ways in which surface mining affects interstate commerce are summarized in the *Virginia Surface Mining* brief (Br. 20-21), and we do not repeat them here. See Sections 101(c), (g), (h), and (j) of the Act, 30 U.S.C. (Supp. I) 1201(c), (g), (h), and (j). They reveal at least three separate and independent grounds for congressional regulation of surface coal mining and reclamation operations under the Commerce Clause. First, because coal produced

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[6] The six provisions are listed and described at J.S. App. 9a-10a.

from surface mines is a commodity sold in interstate commerce, Congress may act under the Commerce Clause to regulate the conditions under which that commodity is produced. *United States* v. *Darby*, 312 U.S. 100, 115, 122 (1941). Second, because surface coal mining operations adversely affect interstate commerce in agricultural products and other commodities by diminishing land productivity, Congress may exercise the Commerce Clause power to protect those aspects of interstate commerce. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256-257 (1964). Third, because surface mining operations cause erosion and landslides, contribute to floods and water pollution, and create dangerous conditions for life and property in nearby communities, Congress may act under the Commerce Clause to prevent such adverse environmental effects from burdening interstate commerce.

The district court conceived the purposes of the Surface Mining Act too narrowly and, in particular, ignored Congress' express intent to strike a balance between the Nation's need for coal and the need to protect the environment and "agricultural productivity." 30 U.S.C. (Supp. I) 1202(f). The court also erred in failing to accord appropriate deference to the congressional determination that surface mining on "prime farmlands" adversely affects interstate commerce. The court's finding that such mining operations "have an infinitesimal or trivial impact on interstate commerce" (J.S. App. 12a) was the primary basis for its holding that the "prime farmland" provisions are not authorized by the Commerce Clause. But, as this Court frequently has explained, reviewing courts may not reweigh the available evidence and substitute their factual judgment for that on which Congress has relied in enacting legislation. See the Secretary's brief in *Virginia Surface Mining*, at 47-48. Certainly it was wholly inappropriate for the district court in the present case, after a one-day hearing, to adopt *verbatim* the factual findings and legal conclusions proposed by plaintiffs and, on that basis, to overturn the

considered judgment of an elected legislature, a judgment reached only after a painstaking review of the available data gathered from interested persons of all persuasions during several years of intense legislative endeavor.[7]

The district court's factual finding with respect to the effects of prime farmland surface mining on interstate commerce rests almost entirely on statistics derived from the *Report of the Interagency Task Force on the Issue of a Moratorium or a Ban on Mining in Prime Agricultural Lands* (A. 51-64), which was submitted to the House Committee on Interior and Insular Affairs in April 1977, more than a month after completion of the Committee's hearings on the proposed surface mining legislation and less than three weeks before issuance of the Committee's Report. See J.S. App. 12a-15a; H.R. Rep. No. 95-218, 95th Cong., 1st Sess. (1977). The Interagency Report suggests only that a complete moratorium or ban on the surface mining of prime farmland is inadvisable as a matter of policy, and, indeed, Congress did not enact any such ban. The Interagency Report does not pretend to examine fully the impact of surface mining on interstate commerce in agricultural commodities, nor does it conclude that the impact is negligible or too small to warrant federal involvement. As explained in the Report of the House Committee, Congress followed the recommendation of the Interagency Report, and rejected the Carter Administration's proposal for a five-

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[7] Although we do not say that judicial adoption of proposed findings submitted by the parties is in itself error, the practice of adopting the entire submission of a single party, to the exclusion of all else, has been repeatedly criticized by appellate courts (see, *e.g.*, *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 & n.4 (1964); *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 731 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980); *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *Leaf* v. *United States*, 588 F.2d 733, 736 (9th Cir. 1978); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1341 n.6 (2d Cir.), cert. denied, 417 U.S. 932 (1974)), and it seems especially inappropriate when used as a basis for holding a federal statute unconstitutional.

year moratorium on surface mining on prime farmlands, specifically because testimony of Soil Conservation Service officials indicated that mined prime farmlands could be restored to their original productivity levels through compliance with the prime farmland provisions now contained in the Surface Mining Act. H.R. Rep. No. 95-218, *supra*, at 184-185.

The district court purportedly was influenced by certain statistics in the Interagency Report comparing the prime farmland acreage being disturbed annually by surface mining to the total prime farmland acreage in the United States (J.S. App. 14a). The Report states that approximately 21,800 acres of prime farmland were being disturbed annually by surface mining at the time of the Report and that this acreage represented .006% of the total prime farmland acreage in the Nation (A. 62). This statistic and others derived from it, together with similar comparisons for the State of Indiana, persuaded the district court that interstate commerce is only minimally affected by surface coal mining on prime farmlands and therefore that Congress lacked power to enact the "prime farmland" provisions.

This is not a viable ground for invalidating legislation enacted under the Commerce Clause. The governing standard is not the volume of commerce regulated by the particular statute under review. As this Court has held, "[t]he power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small." *NLRB* v. *Fainblatt*, 306 U.S. 601, 606 (1939). The question therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated activities will in fact have some impact on interstate commerce. *Perez* v. *United States*, *supra*, 402 U.S. at 154-156; *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964); *Wickard* v. *Filburn*, *supra*, 317 U.S. at 127-129. Here, the *cumulative potential* effect of uncontrolled surface mining on prime farmlands throughout the Nation is the critical factor to be considered, not some more narrowly drawn index focusing

on current crop production or the number of acres under cultivation. As the Court said in *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 648 (1944), "[a]ppropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." See also *Stafford* v. *Wallace*, 258 U.S. 495 (1922).[8]

Even accepting the Interagency Report's statistics at face value, at least 21,800 acres of prime farmland are disturbed each year by surface mining. The Report further indicated that the total prime farmland acreage that might be affected by surface coal mining is approximately 7,000,000 acres. These data were presented to the full Senate by Senator Percy during the floor debate preceding passage of the Act. 123 Cong. Rec. 15713 (1977). In addition, Senator Percy called the Senate's attention to the hearing testimony of Robert L. Masterson, zoning administrator of Knox County, Illinois, who graphically described the losses in agricultural productivity attributable to surface mining operations in his county. *Id.* at 15713-15716; *Surface Mining Control and Reclamation Act of 1977: Hearings on S. 7 Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 775-811 (1977). See also 123 Cong. Rec. 15720-15721 (1977) (remarks of Sen. Humphrey); *id.* at 15721 (remarks of Sen. Stevenson). Similar evidence was presented during the contemporaneous hearings before the House Com-

[8] The Court in *Stafford* stated (258 U.S. at 521):

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

mittee (*Surface Mining Control and Reclamation Act of 1977: Hearings on H.R. 2 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, Pt. IV, 95th Cong., 1st Sess. 16-31, 78-92, 159-172, 235-260 (1977)), and the committee report referred to this testimony in summarizing the origins of the "prime farmland" provisions. The report stated (H.R. Rep. No. 95-218, *supra*, at 184):

> The Committee heard testimony from citizens and local officials of Illinois and Indiana requesting that special attention be given in the bill to the protection of prime agricultural lands. Working with officials of the Soil Conservation Service, the Committee added a number of provisions to H.R. 2 designed to insure the proper reconstruction of soil strata within those areas classified as prime agricultural lands.

Taken together, the evidence before Congress was more than sufficient to support a rational legislative finding that surface coal mining operations on prime farmland substantially affect the production of agricultural commodities and thus affect interstate commerce.[9] The Surface Mining Act and its legislative history reflect a careful balancing of the competing interests of agriculture and surface coal mining, and the legislative accommodation should not be disturbed on the basis of a one-day hearing in the district court.

B. Apart from the "prime farmland" provisions, the district court also ruled that several important Surface Mining Act provisions of general applicability are beyond

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[9] Notwithstanding the commentary in the district court's opinion (J.S. App. 14a), it is irrelevant to the present case that the federal government has in the past paid farmers not to grow crops on certain lands. Such subsidies serve an independent purpose with respect to the pricing of agricultural commodities and, more important, they keep the affected lands out of production only temporarily, thereby helping to maintain or improve the soil's productive capacity. Unregulated surface coal mining, by contrast, can be expected to cause long-term or irreversible soil damage.

the scope of the Commerce Clause power.[10] In this regard, the court did not quarrel with the proposition that surface mining operations affect interstate commerce; it declared simply that the measures adopted by Congress are not rationally related to the concededly legitimate goal of protecting commerce from adverse effects attributable to surface mining (J.S. App. 18a-19a). This holding, too, is incorrect.

All of the provisions invalidated by the district court are reasonably calculated to further the legitimate congressional goals of preserving the productive capacity of mined lands, minimizing the adverse environmental consequences that can result from surface mining or inadequate reclamation of mined lands, and protecting the public from health and safety hazards that may be created by surface mining. For example, the approximate

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[10] The stricken provisions are:

(a) Section 515(b)(3), requiring restoration of surface mined land to its approximate original contour;

(b) Section 515(b)(5), requiring separate removal, segregation, and ultimate replacement of topsoil on surface mined land;

(c) Sections 522(a), (c), (d), (e)(4) and (5), requiring permanent regulatory programs under the Act to establish procedures for the designation of particular lands as unsuitable for surface mining, and restricting surface mining within a specified radius of certain buildings, parks, and cemeteries;

(d) Sections 508(a)(2), (3), (4), (8), and (10), stating requirements for reclamation plans to be submitted as part of permit applications under the permanent regulatory program, including descriptions of the pre-mining use of the affected land, the proposed post-mining use, and the methods by which the proposed use will be achieved;

(e) Sections 510(b)(1) and (2), the general provisions governing approval or disapproval of permit applications under the permanent program, invalidated to the extent that they entail regulatory authority review of proposed post-mining land uses; and

(f) Sections 515(b)(19) and (20), requiring revegetation of mined lands and maintenance of such revegetation for a five- or ten-year period after the completion of mining, invalidated to the extent that they may incorporate a requirement of compliance with a post-mining land use plan approved by the regulatory authority.

original contour requirement in Section 515(b)(3) is designed to avoid the continuing harm that can be caused by unreclaimed mining cuts or cuts that have been improperly restored.[11] As the 1977 Senate report concluded,

> If surface mining and reclamation are not done carefully, significant environmental damage can result. In addition, unreclaimed or improperly reclaimed surface coal mines pose a continuing threat to the environment, and at times are a danger to public health and safety, public or private property.

S. Rep. No. 95-128, 95th Cong., 1st Sess. 50 (1977). See also *id.* at 83; H.R. Rep. No. 95-218, *supra*, at 78, 80, 93.[12]

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[11] A representative of the United States Army Corps of Engineers testified in the 1977 House hearings that more than 4,400,000 acres of land in the United States have already been disturbed by surface mining and that 1,900,000 of those acres have not been reclaimed. *1977 House Hearings, supra*, Pt. II, at 69.

[12] Even if the district court had been correct in its apparent assumption that the sole purpose of the Surface Mining Act is "the alleviation of water or air pollution" that may be caused by surface mining operations (see J.S. App. 19a), the court would still have been wrong in its conclusion that the statutory provisions challenged by plaintiffs bear no rational relation to the achievement of this legislative goal. Although the provisions here at issue do not include all the statutory measures intended to help minimize and control water and air pollution resulting from surface mining (see *id.* at 17a-18a), they do contribute to that end. The approximate original contour and topsoil replacement requirements, for example, are designed to prevent erosion and sedimentation and thus to help preserve water quality. Among the remedial actions specifically recommended to the House Committee by the United States Army Corps of Engineers for the prevention of further adverse surface mining effects on the Nation's water resources was the "[s]egregation and preservation of topsoils during, or preceding, mining operations * * * [in order] to provide soil conditions conducive to rapid revegetation after mining * * *." *1977 House Hearings, supra*, Pt. II, at 86.

The district court's conclusion that the challenged statutory provisions are not "reasonably and plainly adapted to removing any substantial and adverse effect on interstate commerce" (J.S.

Congress had a similar purpose in enacting the various provisions in Section 508 of the Act, which require applicants for surface mining permits under the permanent program to inform the regulatory authority of the intended post-mining use for the land involved and the way in which that use will be achieved. The provisions are designed to permit the regulatory authority to ascertain, before mining begins, whether the prospective mine operator has adequately considered the fate of the land after mining is completed and whether the operator has the technological capability to restore the land in the way proposed.

The relevance of the topsoil replacement requirement in Section 515(b)(5) to the legislative purpose of preserving the productivity of mined land is self-evident. See H.R. Rep. No. 95-218, *supra*, at 106-109; *1977 House Hearings*, *supra*, Pt. II, at 86; A. 132 (affidavit of geologist Allen O. Perry). Similarly, Section 522(e)'s restrictions against surface mining near churches, schools, parks, public buildings, and occupied dwellings are plainly directed toward the purpose of ensuring that the extraction of coal does not endanger life and property in mining communities. Section 522's further requirement that permanent state regulatory programs include procedures for the designation of other locations, on a case-by-case basis, as unsuitable for surface mining serves the same end.

App. 19a) is apparently based solely on conclusory assertions by plaintiffs or witnesses testifying on their behalf. For example, Glenn L. Kaffenberger, an employee of AMAX Coal Company, one of the plaintiffs in this case, was asked on direct examination whether, in his opinion, the approximate original contour requirement is related to the control of water pollutants; he replied, "No" (A. 147). Testimony of this kind is not a sufficient basis for a judicial holding that remedial measures adopted by Congress after careful consideration are not rationally related to the legitimate legislative purpose of protecting aspects of interstate commerce from the dangers caused by surface coal mining.

Congress sought to make certain that the production of coal for interstate commerce would not come at the expense of agriculture, the environment, or public safety. Injury to any of the latter interests would have a deleterious effect on interstate commerce. Moreover, Congress' determination that federal intervention is necessary in this area was based in part on a desire to ensure that mine operators in states adhering to high performance and reclamation standards would not be disadvantaged in competition with their counterparts in states with less rigorous regulatory programs. See 30 U.S.C. (Supp. I) 1201(g). The statutory provisions overturned by the district court advance these legitimate goals of Congress and thus are rationally related to the protection of commerce from the adverse impact of surface mining operations.

II

THE CHALLENGED PROVISIONS IN TITLE V OF THE ACT DO NOT VIOLATE THE TENTH AMENDMENT

The district court held that all the statutory provisions challenged by plaintiffs (except for Section 518(c)) violate the Tenth Amendment because they "constitute displacement, regulation and altering of the management structure and operation of the traditional area of State sovereignty or integral governmental function of land use planning and control" (J.S. App. 35a). The court's conclusion apparently was heavily influenced by its findings that the coal-producing counties in Indiana are dependent upon the surface coal mining industry for their financial well-being, that the Act discriminates against surface coal mining in favor of underground coal mining, and that the Act therefore may have the effect of shifting coal mining operations from surface mining in Indiana to underground mining in Illinois or Kentucky (*id.* at 23a-25a).

The district court's Tenth Amendment ruling is incorrect for the same reasons that the similar decision in

Virginia Surface Mining is erroneous. The deficiencies in the legal arguments embraced by the two district courts are discussed in the Secretary's brief in *Virginia Surface Mining* (Br. 28-38), and we rely on that discussion here. We add a few additional comments focused more particularly on the lower court's opinion in this case.

Reduced to its essentials, the district court's decision proceeds according to the following syllogism:

> *Major premise*: Land use control and planning is a governmental function reserved exclusively to the states under the Tenth Amendment.
>
> *Minor premise*: The Surface Mining Act is and was intended to be a federal land use control and planning measure.
>
> *Conclusion*: The Surface Mining Act violates the Tenth Amendment.

The court simply assumes the correctness of the major premise and devotes most of its efforts to demonstrating the undisputed proposition that the Surface Mining Act will have some effect on the way land is used in coal mining areas. The major premise is erroneous, however, and, despite the district court's efforts to prove the contrary, the Surface Mining Act is not a land use measure after the fashion of the zoning ordinances typically enacted by state or local governments.

There is no authority for the district court's unsupported view that land use control and planning is a governmental function reserved exclusively to the states under the Tenth Amendment. Although this Court has recognized that regulation of private land use is within the inherent police powers of the states and their political subdivisions (see, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 508 n.18 (1975); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)), the Court has never held that such powers are exclusive or that the federal government may not regulate private activities that affect interstate

commerce if such regulation has any effect on land use. On the contrary, when a congressional enactment is properly directed toward the promotion or protection of interstate commerce, it is immaterial for Tenth Amendment purposes that the enactment may also have an impact on land use control and planning. See, *e.g.*, *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 677-678 (1st Cir. 1974) (upholding a regulation under the Clean Air Act that imposed more stringent parking restrictions than the relevant local zoning ordinance).

If this were not the case, Congress' powers under the Commerce Clause would be severely restricted. For example, a federal water control project authorized under the Commerce Clause may have a substantial effect on state and local land use plans; it may determine the course of future land development in an entire region and may result in the inundation of many acres of land contrary to the desires of state and local planners. Under the district court's reasoning, this significant interference with state and local land use objectives would presumably violate the Tenth Amendment. Similar contentions were long ago rejected by this Court, however, in *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534-535 (1941), which held that a federal water project did not contravene the Tenth Amendment merely because it interfered with state water development plans. To cite another example, at least since *Wickard* v. *Filburn*, *supra*, it has been clear that Congress is authorized under the Commerce Clause to regulate the quantity of agricultural commodities that private parties may produce on their land. Even though such regulation plainly affects land use, the Tenth Amendment does not pose any obstacle to such congressional action.

In any event, any actual effects on land use resulting from the challenged provisions in Title V of the Surface Mining Act are temporary and merely incidental to the primary purposes of the statute. The Act's provisions apply to an operator only until the required perform-

ance bond for a mining operation has been released, and that release occurs as soon the Act's reclamation requirements have been satisfied. See Section 519(c)(3), 30 U.S.C. (Supp. I) 1269(c)(3). Contrary to the suggestions in the district court's opinion (*e.g.*, J.S. App. 30a), the Act does not mandate that mined lands actually be used for any specific purpose after reclamation is completed. The Act is concerned with the land's condition and its long-term productive capacity, not the actual use to which an owner may choose to put the land immediately following reclamation. Although the Act encourages the farming of prime farmlands following reclamation, it does not require such use.[13] Once the reclama-

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[13] The Act itself does not explicitly require that a mine operator actually grow row crops on mined prime farmlands during the reclamation period. The Secretary, however, promulgated regulations that impose such a requirement for a portion of the reclamation period. 30 C.F.R. 823.11(c), 823.15(b) and (c), 44 Fed. Reg. 15451-15452 (1979). These regulations were based on a determination by the Secretary that some growing of row crops is necessary to restore the soil productivity of prime farmlands to premining levels and to permit an accurate assessment of whether the productivity has in fact been restored. Notwithstanding this dual justification for the necessity of the regulations if the statutory restoration requirements are to be effectively enforced, the regulations were recently remanded to the Secretary by the United States District Court for the District of Columbia, which concluded that the Act did not authorize the Secretary to require the growing of row crops and that soil productivity could be measured by other means. *In re Permanent Surface Mining Regulation Litigation*, 14 E.R.C. 1083, 1106 (D.D.C. Feb. 26, 1980), appeals pending, Nos. 80-1810 *et seq.* (D.C. Cir. Aug. 26, 1980).

The validity of the Secretary's prime farmland regulations is, of course, immaterial in this case. Assuming *arguendo* that the Act requires the short-term growing of row crops during the reclamation period, this is no different from other measures designed to restore the land's condition, such as regrading, seeding, or fertilizing. The district court in the District of Columbia rejected both statutory and Tenth Amendment challenges to that portion of the Secretary's prime farmland regulations which requires that "cropland" be designated as the immediate post-mining

tion bond is released, a state is free to exercise its full panoply of regulatory powers over the mined lands.

As the Secretary has argued in *Virginia Surface Mining* (Br. 38), the possibility that an otherwise valid federal statute may have some identifiable adverse impact on a state or local economy is not sufficient to establish a Tenth Amendment violation. Likewise in the present case, it is irrelevant whether the challenged surface mining provisions will result in a shift of coal mining activity from Indiana to underground mines in Illinois or other states. Congress, in exercising its Commerce Clause powers, is not restrained by the fact that the impact of a law may fall more heavily on one state than another. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 616 (1950).

Finally, the district court also decided that Sections 522(a), (c), and (d) of the Act violate the Tenth Amendment (J.S. App. 47a). This ruling is especially puzzling. The stricken subsections merely provide that states wishing to assume primary regulatory authority over surface coal mining during the permanent program phase must establish a procedure for the designation of individual parcels of land as unsuitable for all or certain types of surface coal mining operations, if a proper showing to that effect is made at a public hearing.[14] The

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use for prime farmland. See 30 C.F.R. 785.17(d)(1), 44 Fed. Reg. 15374 (1979). The court observed that "the restrictions upon the post-mining use of prime farmland apply only to the point of bond release." *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. May 16, 1980), slip op. 5-6 & n.5, appeals pending, Nos. 80-1810 *et seq.* (D.C. Cir. Aug. 26, 1980).

[14] Lands must be designated as unsuitable for surface mining if the regulatory authority finds, on the basis of a petition and the related written submissions and hearing, that the reclamation required by the Act is not "technologically and economically feasible." Section 522(a)(2), 30 U.S.C. (Supp. I) 1272(a)(2). Lands may be designated as unsuitable for some or all types of surface mining if the regulatory authority determines that the mining activity in question would (i) be incompatible with state or local

provisions in question do not purport to prescribe the uses to which particular lands can be put; they merely create a procedural mechanism for presenting and evaluating claims that particular lands should not be subjected to all or some types of surface mining. Furthermore, Section 522(a)(5) provides that unsuitability determinations "shall be integrated as closely as possible with present and future land use planning and regulation processes at the Federal, State, and local levels." The designation process does not become operative until the Act's permanent program phase, and, in the absence of any showing that the decisions reached under this process will unreasonably interfere with comprehensive state or local land use planning, the statutory provisions cannot be said to threaten the states' "separate and independent existence." See *National League of Cities* v. *Usery*, 426 U.S. 833, 851 (1976).

III

THE PRIME FARMLAND PROVISIONS AND THE APPROXIMATE ORIGINAL CONTOUR REQUIREMENT IN SECTION 515(b)(3) OF THE ACT DO NOT VIOLATE THE SUBSTANTIVE DUE PROCESS OR EQUAL PROTECTION GUARANTEES OF THE FIFTH AMENDMENT

According to the district court (J.S. App. 37a-38a), the lack of variance procedures applicable to the prime farmland provisions and the limitation of permissible

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land use plans, (ii) adversely affect fragile or historic lands, (iii) adversely affect renewable resource lands, or (iv) affect natural hazard lands so as to substantially endanger life or property. Section 522(a)(3), 30 U.S.C. (Supp. I) 1272(a)(3).

Sections 522(a), (c), and (d) of the Act were not specifically challenged in the *Virginia Surface Mining* litigation, although the district court's order purports to invalidate and enjoin all of Section 522, not just the surface mining restrictions in Sections 522(e)(4) and (5). See note 24 in the Secretary's brief in *Virginia Surface Mining*.

variances from the approximate original contour requirement in Section 515(b)(3) to mining on mountaintops and steep slopes impermissibly discriminate against operators and states in the Midwest, where there are significant coal reserves located under prime farmland and few or no steep slopes or mountaintops. In addition, the court said (*id.* at 39a), the prime farmland and approximate original contour provisions themselves are so "irrational, arbitrary and capricious" that they "constitute a deprivation of substantive due process in violation of the Fifth Amendment."

We challenge these conclusions. Economic legislation such as the Surface Mining Act carries with it a presumption of rationality that can only be overcome by a showing of arbitrariness or irrationality. *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 83 (1978); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). One who would establish that such a congressional enactment is arbitrary or irrational bears an extremely heavy burden. *Vance* v. *Bradley*, 440 U.S. 93, 97, 111 (1979). A court may not substitute its judgment for that of Congress merely because it believes that Congress was "unwise in not choosing a means more precisely related to its primary purpose." *Id.* at 109. See also *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 19.

Here, the district court's opinion provides no factual or legal basis for concluding that the provisions in question are arbitrary or irrational. The district court failed to mention, and the plaintiffs failed to present, any concrete factual situation in which the prime farmland or approximate original contour provisions have been applied to a mining operation so as to cause an irrational result. By invalidating these important portions of the Act under the rubric of "substantive due process," the district court effectively behaved as a superior legislative body, judging the wisdom of the policy determinations

made by Congress. *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976); *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963). This it is not permitted to do.

Moreover, even assuming *arguendo* that the provisions in question impose a greater burden on mine operators in midwestern states, that is no basis for striking them down as unconstitutional. A claim of arbitrariness or irrationality cannot be founded merely upon a statute's lack of uniform geographic impact. *Secretary of Agriculture* v. *Central Roig Refining Co.*, *supra*, 338 U.S. at 616; *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939). As this Court explained in *Central Roig Refining* (338 U.S. at 616; citations omitted):

> Nor does the Commerce Clause impose requirements of geographic uniformity. * * * Congress may devise * * * a national policy with due regard for the varying and fluctuating interests of different regions.

The district court misapprehended the applicable standard for determining whether the challenged provisions impermissibly discriminate among mine operators in different areas. The court thought that, in order for the statute to survive review under the Fifth Amendment, "there must be an overriding national interest justifying such difference in treatment, and there must be 'a legitimate basis for presuming that the rule was actually intended to serve that interest'" (J.S. App. 38a). The lone decision cited by the district court as the source of this standard of review is inapposite, however.

Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976), involved a challenge to a Civil Service Commission regulation that classified aliens as ineligible for civil service employment. This Court's decisions have established that classifications based on alienage must be reviewed under a heightened level of judicial scrutiny. See, *e.g.*, *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977); *Graham* v. *Richardson*, 403 U.S. 365 (1971), and the cases there cited. Aliens, by reason of their status as non-citizens, are surely more likely to find themselves at a disadvantage than are

persons living in Indiana, solely by reason of their address. Moreover, as the Court was careful to stress in *Mow Sun Wong* (426 U.S. at 105-116), that case involved the review of an administrative measure not mandated by either Congress or the President. The Court's decision invalidating the regulation was based in large part on the view that the various national interests advanced in defense of the regulation were not within the competence or responsibility of the Civil Service Commission to evaluate and pursue.

Here, by contrast, we are concerned with economic regulatory legislation enacted by Congress. Coal mine operators in Indiana are not a disadvantaged group, and Congress possesses both the responsibility and the competence for adjusting the benefits and burdens of economic life throughout the Nation. In such circumstances, a reviewing court should not overturn the considered judgment of the legislature unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979); *City of New Orleans* v. *Dukes*, *supra*, 427 U.S. at 303. The district court therefore erred in applying the more rigorous standard derived from *Mow Sun Wong*.

The short answer to plaintiffs' discrimination complaint is that the characteristics of surface mining operations vary with geography, and geographical conditions are not the same in all affected states. Congress has determined that measures appropriate for steep-slope mines are not necessarily desirable in flatter terrain and prime farmland areas. That is surely a rational distinction for Congress to draw, and the fact that a particular state has more of one kind of mining operation than another does not establish discrimination in violation of the Due Process Clause of the Fifth Amendment.[15]

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[15] Two other district courts have rejected substantive due process and equal protection challenges to the Surface Mining

IV

THE PRIME FARMLAND PROVISIONS AND SECTION 522 OF THE SURFACE MINING ACT DO NOT VIOLATE THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT

A. The district court ruled that three of the six "prime farmland" provisions take private property without just compensation, in violation of the Fifth Amendment. One of these three provisions requires that, as a condition of obtaining a "prime farmland" surface mining permit, mine operators demonstrate their capability to restore the land, within a reasonable time after the completion of mining, to at least the productivity levels of "non-mined prime farmland in the surrounding area under equivalent levels of management * * *." Section 510(d)(1), 30 U.S.C. (Supp. I) 1260(d)(1).[16] A second

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Act. In *Virginia Surface Mining*, the district court held that the Act does not violate the equal protection principle merely because it may have a disproportionate economic effect on steep-slope mining regions such as southwest Virginia. 483 F. Supp. at 435-436 (79-1538 J.S. App. 41a-42a). The court observed that "almost any form of economic regulation will affect some persons or interests more harshly than others." *Id.* at 436 (79-1538 J.S. App. 41a). Similarly, in *Star Coal Co.* v. *Andrus*, Civ. No. 79-171-2 (S.D. Iowa Feb. 13, 1980), appeal pending on other grounds, No. 80-49, the district court ruled that the Surface Mining Act does not offend the Constitution by regulating only the surface mining of coal and not the surface mining of other minerals. 80-49 J.S. App. 19a-21a.

[16] Section 510(d)(1) provides that the requirement of a showing of technological capability to restore prime farmland to the productivity levels of non-mined lands shall apply to all permits issued after the date of the Act, August 3, 1977. For this reason, the Secretary of the Interior concluded that Congress intended the "prime farmland" provisions tc apply during the interim, as well as the permanent, phase of the regulatory program. The Secretary's statutory interpretation is reflected in his interim regulations (see 30 C.F.R. 716.7, 42 Fed. Reg. 62661, 62693 (1977)), and this construction of the Act was sustained by the United States Dis-

of the three provisions requires that mine operators actually complete such restoration in order to obtain release of their performance bonds for "prime farmland" projects. Section 519(c)(2), 30 U.S.C. (Supp. I) 1269(c)(2).[17] The third "prime farmland" provision attacked as a taking is simply a reporting requirement that directs mine operators to include in reclamation plans filed as part of "prime farmland" permit applications a statement of the premining productivity of the land, specifying "the average yield of food, fiber, forage, or wood products * * * obtained under high levels of management." Section 508(a)(2)(C), 30 U.S.C. (Supp. I) 1258(a)(2)(C). The district court held (J.S. App. 41a) that these three provisions effect an unconstitutional taking of property because, in the court's view,

> it is technologically impossible to reclaim prime farmland in a postmining period so that equal or higher levels of yield under high levels of management practice can be achieved.

The district court's decision that the "prime farmland" provisions violate the Just Compensation Clause is incorrect for several reasons. As in *Virginia Surface Mining*, plaintiffs' taking claims did not focus on any particular properties to which the challenged provisions have been applied, and the district court did not base its ruling on the denial of a surface mining permit for specific prime farmland operations proposed by plaintiffs. As in *Virginia Surface Mining*, the district court did not accord

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trict Court for the District of Columbia in *In re Surface Mining Regulation Litigation*, 452 F. Supp. 327, 336 (1978). This aspect of the district court's decision was not appealed to the D.C. Circuit, and the applicability of the prime farmland provisions during the interim regulatory phase is not at issue in the present litigation. Under Section 526(a)(1) of the Act, 30 U.S.C. (Supp. I) 1276(a)(1), judicial review of the Secretary's implementing regulations may be had only in the United States District Court for the District of Columbia.

[17] Performance bonds are required for all surface mining permits under the Act. See Section 509, 30 U.S.C. (Supp. I) 1259.

proper deference to the congressional determination that particular regulatory measures, adopted after lengthy legislative deliberations, are both feasible and desirable. On the contrary, the district court in the present case appeared to assume (J.S. App. 40a) that the prime farmland provisions could be sustained only if the Secretary came forward with academic studies demonstrating that mined lands can in fact be restored to the productivity levels of non-mined lands in the surrounding area. As in *Virginia Surface Mining*, the district court failed to follow this Court's precedents regarding the showing necessary to establish a taking of private property within the meaning of the Fifth Amendment. The court did not consider other beneficial uses remaining available for prime farmland that may not be surface-mined, nor did it acknowledge the legislature's broad discretion to prevent noxious uses of property. All of these deficiencies are discussed in some detail in the Secretary's brief in *Virginia Surface Mining* (Br. 39-60), and we rely primarily on that discussion. We address one additional point concerning the "prime farmland" provisions.

In arriving at its "finding" that the required restoration of prime farmlands is "technologically impossible," the district court adopted plaintiffs' rhetorical labels for the description of different land management practices and, as a consequence, misconstrued the statute. Sections 510(d)(1) and 519(c)(2) of the Act contemplate restoration of the productivity of mined prime farmlands to levels of yield equivalent to those attained on "nonmined land of the same soil type in the surrounding area under *equivalent* management practices" (emphasis added). In their submission of proposed findings of fact and conclusions of law to the district court, plaintiffs referred to two "levels of management" that could be applied to prime farmlands: "high" levels and "basic" levels. The district court assumed that, under the Act, mined prime farmland must be restored to a productivity level equivalent to that of unmined land under "high levels of management," whenever such "levels of management" are the prevailing practice in the surrounding

area. The court then concluded that, although mined land can be restored to the productivity of unmined land under "basic levels of management," restoration to productivity under "high levels of management" is impossible.

The difficulty with all this, of course, is that the terms "high levels of management" and "basic levels of management" are not defined either in the statute or in the district court's opinion. Indeed, the terms do not even appear in either Section 510(d)(1) or Section 519(c)(2), the two operative prime farmland provisions.[18] Those

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[18] Section 508(a)(2)(C) is the only statutory provision that uses the term "high levels of management." The subsection provides that reclamation plans accompanying permit applications must contain information concerning the pre-mining productivity of the land under "high levels of management." The provision does not define "high levels of management," however, and it does not indicate whether the term is to be contrasted with "low," "basic," "good," or "average" levels of management or with some other standard. The term "basic levels of management" is not found in the Act at all.

We note for the Court's information that among the permanent regulations promulgated by the Secretary was one describing the required contents of reclamation plans for prime farmlands. Such plans were to contain, *inter alia*, a statement of current estimated yields under a "high level of management." The regulation provided that these estimates were to be used as a "predetermined target level for determining success of revegetation." 30 C.F.R. 785.17(b)(8), 44 Fed. Reg. 15374 (1979). This regulation was based on the language of Section 508(a)(2)(C). However, the United States District Court for the District of Columbia, in reviewing the regulation, ruled that the Act requires only that the reclamation plan provide information regarding pre-mining yields under high levels of management and does not authorize the use of such information as a standard of comparison for determining the success of post-mining revegetation in all circumstances. The court emphasized that, under Sections 510(d)(1) and 519(c)(2), restoration capability (at the permit application stage) and restoration success (at the bond release stage) must be measured on the basis of "equivalent" levels of management. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. May 16, 1980), slip op. 4-5, appeals pending, Nos. 80-1810 *et seq.* (D.C. Cir. Aug. 26, 1980). Accordingly, the court remanded the regulation to the Secretary.

provisions state only that productivity comparisons between mined land after restoration and unmined land in the surrounding area must be based on "equivalent" levels of management. The statute does not specify what constitutes equivalence for purposes of the Act. Evidence presented in the district court showed that the terms "high levels of management" and "basic levels of management" have no universally accepted meaning.[19]

In essence, plaintiffs and the district court have interpreted the Act to make the statutory reclamation requirements, by definition, impossible to satisfy. Although the ambiguous term "high levels of management" was not expressly defined in the court's opinion, the court in effect defined it as that level of management which will make it "technologically impossible" for operators to restore prime farmland to the necessary level of productivity. The court thus construed the statute to produce

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[19] In particular, Dr. Donald E. McCormack, Director of the Soil Survey Interpretations Division of the United States Soil Conservation Service, testified that "application of these kind [*sic*] of terms has been very provincial in the United States" (A. 157). He stated that, although the Soil Conservation Service has established a definition of "average" and "high" levels of management for its computer purposes, it has no definition for the term "basic levels of management" (*ibid.*). According to Dr. McCormack, the term "basic levels of management" has not been defined for national purposes and apparently is a term primarily used in Illinois (*id.* at 157-158). Dr. William W. McFee, an agronomy professor, testified that the term "high level of management, of course, is difficult to define. But it's usually accepted as being the type of management employed by a certain percentage of the operators in that area" (A. 136). Mr. Alten F. Grandt, Director of Reclamation for Peabody Coal Company, stated that the terms "high levels of management" and "basic levels of management" are scientific terms within the agricultural community (A. 142), but he provided no definition of the terms. Furthermore, Mr. Grandt testified that "high levels of productivity" are equivalent to "levels of productivity that could be obtained under basic levels of management" (*ibid.*). The overall impression created by a review of the testimony in the district court is that considerable uncertainty exists concerning the meaning of the terms on which the court relied in invalidating the prime farmland provisions.

an absurd result, one that surely was not intended by Congress. Duly enacted legislation should not be overturned on such a tenuous basis. Reviewing courts should interpret statutes to avoid constitutional problems, not to create them. See, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974); *United States* v. *Raines*, 362 U.S. 17, 20-22 (1960).

Moreover, the evidence presented to the district court fully supports the proposition that the restoration of prime farmland required by the Act is technologically possible.[20] And, even if there were no existing evidence or studies conclusively showing that mined prime farmlands could be restored to the required levels of productivity, that alone would not establish that it is impossible to meet the Act's requirements. The prime farmland provisions are "technology-forcing" measures in the sense that Congress wanted the surface mining industry to develop as rapidly as possible whatever technology is needed to achieve the desired result. In the absence of a specific factual situation involving a thorough but unsuccessful good-faith effort to meet the Act's requirements, there is no basis for a judicial conclusion that the requirements cannot reasonably be met.

B. The district court also held that Sections 522(a), (c), and (d) of the Act are unconstitutional because they "provide a procedure to prevent the removal of coal thereby destroying the mineral interest" (J.S. App. 41a). The court provided no support of any kind for its decision.

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[20] See Def. Exhs. A, B, F, and G (A. 105-108, 121-122, 127-129); the testimony of Dr. Donald E. McCormack (A. 157); the Interagency Report (A. 57-59); and the testimony of Alten F. Grandt, Director of Reclamation for Peabody Coal Company (A. 143-144). See also the letter from John A. Conlon, one of the plaintiffs, in which Mr. Conlon states that "the coal industry is quite capable of returning all surface mine[d] land to pre-mine productivity levels. In some instances, actual improvements have been noted" (A. 110).

Again, the plaintiffs' challenge to these provisions was purely hypothetical; they did not allege or show that the procedures for designating areas as unsuitable for all or certain types of surface mining had ever been applied to them. In fact, Sections 522(a), (c), and (d), by their own terms, are not effective until the Act's permanent program phase becomes operative. See Section 522(a)(1), 30 U.S.C. (Supp. I) 1272(a)(1). Since no permanent regulatory program has yet been implemented in Indiana, plaintiffs could not have made such a showing.

Even if an actual controversy had been presented, the district court's ruling totally ignores the clear language and limited effect of the challenged provisions. Sections 522(a), (c), and (d) merely establish a procedure for designating areas as unsuitable for surface mining. The actual decisions whether a particular area, or any areas at all, should be so designated are to be made by the regulatory authority in the permanent program. The appropriate focus for an aggrieved mine operator's complaint should be such individual designation decisions, not the statute that by itself does nothing more than make such designations possible. In addition, the district court did not mention that, under Section 522(a)(6) of the Act, the designation procedure does not apply to lands on which surface coal mining was being conducted on the date of enactment or "where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977." The district court also failed to weigh the fact that any designation of unsuitability under Section 522 may be limited to certain types of surface mining and leave other types unaffected. In short, the court's ruling that Sections 522(a), (c), and (d) violate the Just Compensation Clause is an ill-considered judgment, adopted directly from plaintiffs' submission, and not the product of any independent examination of the statutory provisions, their method of operation, or their effect on the litigants before the court.

The district court's further decision (J.S. App. 42a) that Sections 522(e)(4) and (5) of the Act take private property by restricting surface coal mining in the immediate vicinity of roads, cemeteries, parks, churches, schools, public buildings, and occupied dwellings is identical to the ruling in *Virginia Surface Mining* regarding these provisions (79-1538 J.S. App. 56a-57a). The Secretary's brief in *Virginia Surface Mining* argues (Br. 52-58) that these narrowly defined restrictions do not violate the Just Compensation Clause. The contentions made there are equally applicable here.

V

THE CIVIL PENALTY PROVISIONS IN SECTION 518(c) OF THE ACT DO NOT VIOLATE THE DUE PROCESS CLAUSE

The district court's procedural due process ruling with respect to the constitutionality of Section 518(c) of the Act merely follows the decision on the same issue in *Virginia Surface Mining*. The Secretary's arguments on this point are fully stated in his brief in *Virginia Surface Mining* (Br. 67-71). We add only the observation that plaintiffs here, like their counterparts in *Virginia Surface Mining*, have made no showing that they were ever assessed civil penalties under the Act, much less that the statutory prepayment requirement was ever applied to them or that it caused them injury.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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